STATE OF MICHIGAN

COURT OF APPEALS

GRECIA T. DAVENPORT, f/k/a GRECIA T. MOSHOLDER, Plaintiff-Appellee, v DENNIS M. MOSHOLDER, JR., Defendant-Appellant.	UNPUBLISHED September 9, 2010 No. 295852 Ingham Circuit Court LC No. 06-001439-DM

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

Defendant Dennis M. Mosholder, Jr., appeals as of right a circuit court order granting plaintiff Grecia T. Davenport's motion to change the domicile of the parties' minor child from Michigan to Georgia. We reverse and remand for further proceedings.

The parties married in 2001 and their son, DMM, was born a year later. In 2006, the circuit court entered a consent judgment of divorce that granted the parties joint legal and joint physical custody of the child. On March 31, 2009, the mother filed a petition seeking to change DMM's domicile to Georgia. The petition averred that the mother planned to remarry in February 2010, and that her fiancé resided in Georgia. The father opposed the child's move. A conciliator met with the parties in April 2009, and recommended that the circuit court deny the mother's motion. The mother objected to several findings made by the conciliator, and in August 2009 a circuit court referee commenced an evidentiary hearing.

The referee found that DMM lived with his mother for nine of every 14 overnights during the school year, and with his father for the balance. DMM generally resided with his parents for alternating weeks in the summer and the parties shared holidays. However, the mother acknowledged that in Summer 2009, the child "spent the majority of his time with his dad." The mother also admitted that the father or his parents retrieved the child from school every day, and that a combination of the father and the paternal grandparents provided after-school child care. The referee found that the father "has had frequent contact with the minor child in addition to his ordered custodial time, at times up to a daily basis on week days," and that DMM's established custodial environment existed "jointly with both parties." The referee concluded that the mother had not proven by a preponderance of the evidence that the proposed move had the capacity to improve the child's quality of life, and recommended that the circuit court deny the mother's motion.

The circuit court conducted a de novo hearing, at which both parties testified. In a written opinion and order entered on December 18, 2009, the circuit court granted the mother's motion to change DMM's residence after reviewing the *D'Onofrio*[1] factors, which are codified at MCL 722.31(4). The court also determined that although DMM had an established custodial environment with both parents, the proposed move would not alter the child's established custodial environment:

> Although the proposed custodial schedule does reduce the number of overnights the Defendant may have, the Court finds this does not change the established joint custodial environment, especially in light of the current school year schedule. Further, the Defendant will have the opportunity to exercise 138 overnights with [DMM], which is nearly the same amount he currently enjoys. The Court is not persuaded by Defendant's argument that changing the custodial schedule by allowing the change of legal residence and domicile necessarily changes the established custodial environment. An established custodial environment may exist with both parents even if one parent provides the child's primary residence and the majority of financial support. . . . There are no set amount of days a child must spend with a parent to establish or continue that environment. Although the duration of time [DMM] spends with each parent is a factor, it is not controlling. [DMM] will have open access to both parents and both parents have open access to him. This provides him with continued security and stability even though the custodial schedule and his legal residence and domicile have changed.

The father first challenges on appeal the circuit court's findings relating to MCL 722.31(4)(a). We review for an abuse of discretion a circuit court's ultimate decision regarding a petition to change a minor child's domicile. *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). This Court reviews the circuit court's factual findings "under the great weight of the evidence standard." *Rittershaus v Rittershaus*, 273 Mich App 462, 464; 730 NW2d 262 (2007) (internal quotation omitted). This standard of review requires us to affirm the circuit court's factual findings "unless the evidence clearly preponderates in the opposite direction." *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000).

The first *D'Onofrio* factor, MCL 722.31(4)(a), addresses "[w]hether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent." The circuit court concluded that both the mother and DMM would benefit financially from the proposed move because the mother's fiancé earned over $250,000 a year, while the mother's Michigan income equaled less than $40,000 a year. The circuit court further found that the mother's greatly enhanced family income would allow her to spend more time with DMM as a "stay at home" mother. The father asserts that irrespective of an increase in the mother's

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[1] *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27, aff'd 144 NJ Super 352; 365 A2d 716 (1976), adopted by the courts of this state in *Dick v Dick*, 147 Mich App 513, 517; 383 NW2d 240 (1985). New Jersey courts subsequently modified the test for whether to grant a change in domicile. See *Holder v Polanski*, 111 NJ 344, 349-354; 544 A2d 852 (1988).

family income, DMM enjoyed "a very nice standard of living" in Michigan, and that DMM's distance from his father and paternal grandparents would deprive him of their close, daily sustained relationship. According to the father, although advantageous for the mother, the move did not have the capacity to improve DMM's quality of life.

We consider the father's argument bearing in mind that "a reviewing court should not substitute its judgment on questions of fact unless they 'clearly preponderate in the opposite direction.'" *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994), quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). In *Fletcher*, the Supreme Court instructed that the scope of an appellate court's review must focus on whether the circuit court's factual determinations are "so contrary to the great weight of the evidence as to disclose an unwarranted finding, or whether the verdict is so plainly a miscarriage of justice as to call for a new trial." *Id*., quoting *Murchie*, 355 Mich at 558. While reasonable minds might differ about the extent to which the move to Georgia had the capacity to improve DMM's quality of life, the circuit court's finding was grounded in the evidence, and we cannot characterize the finding as manifestly unjustifiable or palpably incorrect. Consequently, we decline to reverse the circuit court on this ground.

The father next contends that the great weight of the evidence contradicted the circuit court's findings concerning the *D'Onofrio* factor embodied in MCL 722.31(4)(c):

> The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

The circuit court explained in relevant part as follows its view of the father's parenting time opportunities in the event of an approved move to Georgia:

> [DMM] would live primarily with [the father] during the summer. He would also have custodial time for an extended Thanksgiving break, three weeks during the Christmas holiday, spring break and weekends or extended weekends in September, October, February and March. [DMM] would have regular access to his father via webcam, which would be provided by [the mother]. Under the proposed schedule, [DMM] would have approximately 55 days with his father during the school year, as well as near daily contact. He also would have 8 weeks of custodial time in the summer. Although this is not the same amount of custodial time [DMM] currently has with his father, the Court finds that it is possible to order a modification of the custodial schedule and other arrangements governing [DMM's] schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship, especially in light of the current school year schedule.

The father maintains that "[d]espite the number of overnights" he would have with his son, the proposed schedule relegates him to the role "of a weekend and vacation father," unable "to be a regular part of his son's life during the other nine months of the year." In *Mogle*, 241

Mich App at 204, this Court explained that a "new visitation plan need not be equal to the prior visitation plan in all respects. It only need provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the noncustodial parent." Unfortunately, a move involving great distances always challenges the remaining parent's ability to preserve and foster his or her parent-child relationship, and after a relocation precise replication of prior parenting time "could never be possible." *Anderson v Anderson*, 170 Mich App 305, 310; 427 NW2d 627 (1988). Nevertheless, a domicile change still must afford the parent left behind "a realistic opportunity" to maintain and nurture the parental relationship. *Id*. at 310-311. While a close question, we again cannot conclude that the circuit court's finding, that the father had an adequate opportunity to preserve and foster his relationship with DMM, contravened the great weight of the evidence.

The father next asserts that the circuit court erred by declining to consider whether clear and convincing evidence established that the move to Georgia served DMM's best interests, as required by MCL 722.23. The circuit court found that an established custodial environment existed with both parents, with the mother having "primary physical custody" during the school year. However, the circuit court ruled that the proposed move to Georgia would not alter DMM's established custodial environment because the father

> will have the opportunity to exercise 138 overnights with [DMM], which is nearly the same amount he currently enjoys. . . . [DMM] will have open access to both parents and both parents have open access to him. This provides him with continued security and stability even though the custodial schedule and his legal residence and domicile have changed.

A custodial environment "is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). "Where there is a joint established custodial environment, neither parent's custody may be disrupted absent clear and convincing evidence." *Sinicropi v Mazurek*, 273 Mich App 149, 178; 729 NW2d 256 (2006), citing *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). If a proposed relocation "would result in a change in parenting time so great as to necessarily change the established custodial environment," the court must conduct an inquiry into the best interest factors set forth in MCL 722.23. *Brown*, 260 Mich App at 594-595, 598 n 7. In ascertaining whether a proposed change modifies an established custodial environment, "it is the child's standpoint, rather than that of the parents, that is controlling." *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010).

The circuit court's finding that the move to Georgia would occasion no change in DMM's established custodial environment contravenes the great weight of the evidence. The record supports that the father enjoyed almost daily contact with DMM, attended and helped coach his flag football practices, and served as the child's scout den leader. DMM and the father regularly read together, played catch and golf, and worked on science projects of the father's design. Viewed from DMM's standpoint, a move to Georgia would disrupt the child's ready access to his father and impair the child's ability to receive guidance, structure, and comfort from his father. We reject the notion that contact through a webcam, even if maintained daily, may effectively substitute for the established custodial environment present in this case. Because the move would alter DMM's established custodial environment, the circuit court erred by declining

to examine whether the move clearly and convincingly would enhance DMM's best interests. MCL 722.23.

We remand for the circuit court to determine whether clear and convincing evidence supports that the move to Georgia serves DMM's best interests. In light of the fact that DMM has spent a portion of 2010 in Georgia with the mother, we remind the circuit court that a child can have an established custodial environment with two parents, even if the child primarily resides with one parent and that same parent also supplies most of the child's financial support. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000).[2]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly

[2] The father lastly alleges that the circuit court erred by determining that a change of school districts served DMM's best interests, but we need not address this issue in light of our decision to remand for a hearing to address whether the move to Georgia will serve DMM's best interests, in conformity with MCL 722.23.